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ABSTRACT

Federal collective bargaining legislation for public employees could create confrontations between federal government and state-local governments. Political promises can be foiled by bargaining outcomes, therefore states with bargaining rights should be exempted from the federal law. Equity between public and private employees is another problem that involves the issue of the right to strike. Equity must be a result of bargaining rather than of law, which involves the issue of public policy and what is negotiable. A third problem occurs when one level of government mandates costs or policies to be observed at another level. Federal law will affect the bargaining power at the local level. ' federal law will inevitably result in a new balance of power between management and public employee unions. Impact will also be felt on matters of job security, retirement, work day, sick leave, and other mandatory issues. If we continue to ignore the genuine dangers of a federal bill, and if we cannot find a way to meet the legitimate representational needs of public employees without sacrificing essential managerial ones, state and local government will be impaled between domination by the federal bureaucracy and domination by public employee unions. (Author/DW)

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Neglected Issues in Federal Public Employee Collective Bargaining Legislation*

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In dealing with federal legislation providing collective bargaining rights for state and local public employees, it is easy to become identified as "labor" or "management", with the consequence that one's views are automatically discounted as biased for or against certain groups or interests or policy positions. For this reason, and although the substance of my analysis should stand or fall according to its merits, it may be helpful to begin by discussing the perspective and context which guide it. My purpose is not to claim an absence of bias in these matters but to assist interested parties to identify and evaluate that bias, whatever it is and in whatever measure.

My full-time position is professor of education, Baruch College and Graduate Center, The City University of New York. I also serve as a consultant on employment relations to the American Association of School Administrators, an assignment which requires approximately one day's work per month.

At CUNY, I am a member of the Professional Staff Congress, a faculty union affiliated - as are all teacher and professorial unions in New York - with the New York State United Teachers and hence with both the National Education Association and the American Federation of Teachers, AFL-CIO. As you know, both the NEA and the AFT are national organizations actively lobbying for federal public employee collective bargaining legislation. In 1974, I was elected to serve a three year term as a delegate to the NYSUT state convention, and to the NEA and AFT conventions in 1974, 1975, and 1976. By 1976, my active involvement with

EA 007 042

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teacher unions will have spanned a period of over 20 years. My first book, Education as a Profession, which was published in 1956, appears to be the first text in the field of education to support collective bargaining by teachers in so many words. I was a member of the Executive Board of the New York City local of the AFT from 1956 to 1959 and was one of the two major candidates for the presidency of the AFT in 1962. And although I have not checked my records completely, I have been offered and have accepted paid employment every year since 1965, from one or both of these national teacher organizations. Thus although I represent nobody here but myself, my record is one of long time support for collective bargaining, even at times and under circumstances when it was professionally dangerous to do so, even in the NEA.

In my own view, the public policy justification of collective bargaining is essentially a conservative one. I fear the arbitrary and capricious power of employers, including public employers, in dealing with their employees. Abuses of managerial power cannot ordinarily be restrained or limited by individual employees. Instead, such restraint typically requires employee organizations which are responsible to employees and are not dominated or supported by employers, public or private. The reason why totalitarian governments can coerce individual employees is that the latter have no organizational means of defending their interests, or the public interest generally. Regardless of the intentions of the particular individuals who constitute public management at any given time, severe managerial abuses are inevitable unless public employees can form and join organizations which can represent them effectively to their employer and the public. Thus apart from the legitimate but essentially self serving motivations which underlie a great deal of the union effort to enact federal legislation providing col-

lective bargaining rights for all state and local public employees, there is a legitimate, although not necessarily decisive, argument for doing so. In recognizing this argument, however, we should not overlook the possibility that employees need protection from unions as well as from employers. The analysis which follows does not deal with this possibility, but it should not be ignored in legislation on the subject.

Needless to say, the case for collective bargaining rights for state and local public employees overlaps but is far from identical with the case for federal legislation to achieve this objective. One reason is that unlike state legislation on the subject, federal legislation may drastically increase and intensify confrontations between the federal government on the one hand, and state and local governments on the other. For example, governors and mayors frequently if not typically have decisive roles in bargaining with state and/or local public employee unions. Even with best of intentions on all sides, it is inevitable that federal-state confrontations will arise over such matters as alleged management unfair labor practices.

Let me try to illustrate the problem. Suppose a governor had campaigned for the position on a platform which limited public employee benefits to a certain level. At the bargaining table, how can such a governor bargain on a union proposal to exceed the benefit level the governor had promised not to exceed? To do so might be suicidal politically, just as it would be suicidal for a public employee union leader not to submit and press for gubernatorial concessions above this level. What happens if our hypothetical governor is cited for an unfair labor practice, for refusing to bargain on a mandatory subject of negotiations? One shudders to think of the consequences of a federal agency ruling that the governor's obligation to bargain superseded the public policy position which was the basis of the governor's

election. Of course, it will be argued that candidates should not run for office on the basis of policies they cannot implement. Granted - but do we want to make it impossible for state and local candidates to campaign on public personnel issues? More precisely, do we want to enact federal legislation which would have this effect? If not, a federal law providing bargaining rights for state and local public employees will have to be quite different from private sector legislation.

As I have suggested previously, federal-state confrontations are inevitable even where reasonable men with good intentions are involved. Unfortunately, such will not always be the case. On this issue, the crucial question is not whether most of our political leaders will obey the law, as I am sure they will. It is how many exceptions and confrontations can our constitutional system absorb and endure? To many of us, one governor standing in the school house door was a lot - perhaps the maximum number. And I say this as one who not only believed but was extremely active in promoting federal intervention in the civil rights area. It is one thing, however, to recognize the inevitability of federal-state confrontations, even after every effort short of suspending the constitution is made to avoid them, and a totally different thing to enact legislation which is bound to generate such confrontations.

Going back to our hypothetical governor faced with a clear cut political commitment which conflicts with a federal bargaining mandate, I suspect the outcome will vary from time to time, governor to governor, and situation to situation. That, I submit, is precisely the problem. The probability is that on some occasions, defiance of federal authority will be politically advantageous, even essential, to certain state and local

political leaders. Given the numbers of state and local public employees, their importance to state and local tax rates, the political visibility of their benefit levels, and the likelihood that being forced by the feds will be politically attractive to some state and local leaders, the dangers should not be minimized or neglected.

From these observations, it follows that if federal legislation is to be enacted at all, it should minimize the likelihood of confrontations between different levels of government. Such a view would call for exemption from federal regulation of states which provide a certain level of representational rights for their public employees. I do not, either on paper or in my nervous system, have a list of such rights; my point is simply to suggest an approach which follows from this analysis thus far. Such an approach would seek to identify a realistic and useful balance between the desirability of public employee representation rights on the one hand and the need to minimize federal-state confrontations on the other. This is likely to be a complex task. What will be politically feasible may be undesirable from a public policy standpoint, but that remains to be seen.

Let me now turn to another difficult but neglected issue, the problem of achieving equity between public and nonpublic employees. Public employee unions have been promoting federal public employee bargaining legislation on the grounds that it is essential to achieve "equity" between public and nonpublic employees. Presumably, everybody is for equity as an objective.

The trouble is that there is so little agreement on what is or would be equity in practice.

Let us start with the conventional public employee union argument. Teachers in private schools can bargain and strike; those in public schools

cannot. Bus drivers employed by privately owned bus companies can bargain and strike. Those employed by municipally operated firms cannot. In this context, we are told that the distinction between public and private employment should not matter because the consequences of a strike are the same in both cases. This being the case, it is allegedly inequitable to prohibit public sector employees from striking while legalizing this right for private sector ones.

Like everyone else, I am quite willing to accept equity as an objective. What, however, is the scope of the equity with which we should be concerned? Let me illustrate the problem by citing a similar one which arises at the bargaining table. Suppose you are bargaining with a public employee union which contends, and correctly so, that its constituents have less personal leave benefits than any other public employee union in the area. Clearly, this appears to be an inequity requiring management concessions at the bargaining table. Suppose, however, that this same group of public employees has sick leave benefits which exceed those elsewhere in the area. If you grant your employees their demands on personal leave, you may be providing not just equity but much more than equity. Your employees may have the best total package, consisting of the best sick leave and, let us say, some personal leave. On whose side are the equities now?

In other words, equity is a desirable objective, but its presence or absence in bargaining must be resolved in the context of a total package, not isolated terms and conditions of employement. The same principle can and should be applied to legislation purporting to provide public employees equity vis-a-vis those in the private sector. At the bits and pieces level, we can always find items on which public employees are disadvantaged in comparison to employees in the private sector. The question is whether there

are any advantages of public sector employment which are not shared, or not shared equally, by private sector employees?

History, logic, and current data all suggest that there are. Historically, collective bargaining in the private sector emerged as a means of self help for those who needed it most. This is hardly the case with public employees in many states. For example, teachers are protected to some extent from artibrary dismissal by tenure laws in about 40 states. On the other hand, there were no such statutory protections for private sector employees who gained bargaining rights under the National Labor Relations Act. Similarly, all states have retirement systems providing some benefits and protections for public employees, whereas such benefits and protections were non-existent or minimal in the private sector when bargaining rights were established therein.

The nature and extent of legislation on public employee benefits varies considerably between states and even within states for different categories of public employees. Until the statutory benefits are spelled out in some detail, it may be hazardous to generalize about the benefit level. It is clear, however, that the benefit level in some states which have not enacted a public employee collective bargaining law, such as California, is very substantial and is far greater than was envisaged - or thus far even achieved - by substantial numbers of private sector employees with bargaining rights. If equity as to the <u>means</u> of achieving benefits is the objective, should not federal and state bargaining legislation be tied to repeal of the statutory benefits on retirement, sick leave, seniority, holidays, work day and work year, leave benefits (sick, personal, military, bereavement, etc.) and other protections and benefits now provided public sector employees by statute? Private sector employees do not have the statutory as well as the bargaining

system of benefits, either procedurally or in terms of substantive benefits and protections. Indeed, as a result of recent Supreme Court decisions involving teacher tenure, public employees now have forms of job security even in the absence of statute which are not available to millions in the private sector.

My point is not that public employees should not have job security or sick leave or other benefits. It is that if equity is the objective, as they allege, then public employee unions should get their benefits and protections at the bargaining table, in the same way that their counterparts do in the private sector. As I emphasized earlier, it is difficult to ascertain where the equities lie, since we do not have an adequate picutre of state procedural and substantive benefits for public employees. My guess is that in some states, super-imposing bargaining rights upon legislated public employee benefits would result in major inequities to the disadvantage of private sector employees. In other states, public employee bargaining legislation would not result in such inequities because of the absence of legislation on public employee benefits. It should be noted, however, that the states with low levels of public employee benefits also tend to have low levels of private sector benefits. Constitutionally, and even in the absence of a federal or state public employee bargaining law, teachers in Mississippi enjoy protections not shared by many private sector employees in Mississippi. Nevertheless, this is the crucial equity comparison, not the comparison between Mississippi teachers and Michigan auto workers.

One of the most neglected, but most troublesome problems of equity relates to the much greater availability of political concessions for public sector employees. In the private sector, the union bargains, gets what it can, and that's it for most practical purposes. In the public sector, however,

the public employeescan and frequently do play a crucial role in determining who shall be the governors, mayors, school board members - i.e., who shall be management in the public sector. The availability and practicality of this option in the private sector (e.g., a union voting shares of stock to affect the choice of management personnel, or management policies at the bargaining table) is so marginal and so infrequent that it can be disregarded here. Such disregard would be clearly inappropriate in many cities and states where public employee union support is a key factor in who gets elected - and hence in the settlements reached and in the opportunities for legislative benefits to supplant contractual ones.

The dilemma here is fundamental and its resolution will not be easy. If bargaining is merely the prelude to legislative appeals, there is a strong disincentive to public management to make concessions at the bargaining table. The logic is similar to that involving arbitration of interest disputes. Why make concessions which will only be used as the point of departure in an appeal to legislative bodies for more? If there is no finality to bargaining, employer concessions made in bargaining lead to excessive settlements at the legislative level.

On the other hand, policies concerning public employment, including public employee benefits and protections, are inherently matters of public policy. It would be difficult if not impossible to exclude such matters from public discussion, even assuming - which I do not - that it would be desirable to exclude such issues from the political process. Clearly, the political alternative works to the advantage of public employees, at least in the sense that it is an option not typically available to private sector employees. One might argue, therefore, that the equity argument logically justifies only limited bargaining rights for public employees. Put in dif-

ferent language, super-imposing private sector bargaining rights and procedures upon state and local public employment is likely to result in significant advantages for public sector vis-a-vis private sector employees.

It should also be noted that the equity argument can also be interpreted to limit the right to strike in the private sector. As matters stand, the public employee unions emphasize the inconsistency of permitting strikes in the private sector but prohibiting them when the identical work is done by public sector employees. Of course, this is a two edged sword. The equitable solution is some cases might be to prohibit strikes by the private sector employees, instead of legalizing them for public sector ones. To be specific, perhaps we should prohibit strikes by certain private sector employees, such as bus drivers or security guards, rather than legalize them for public employees who do the same work. Of course, an approach to achieving equity by limiting the right to strike in private employment is not going to receive union support, logical as it may otherwise be.

There is also reason to be concerned about problems of accountability relating to federal legislation. It is always risky to have one level of government mandating costs or policies to be observed by other levels. For example, state legislatures frequently mandate costs which must be paid by local taxes. A few years ago, I witnessed a good example of this bad practice. A New Jersey school district with which I worked had just reached agreement with its teacher union. The union represented the school nurses, who were included in the teacher bargaining unit. As had been customary in that district, and many others in the state, the agreement included a salary schedule in which the school nurses were paid $3-5,000 less than the teachers.

A few months after this agreement was reached, the New Jersey legislature enacted legislation which required school districts to place school nurses on the teacher salary schedule. In this particular district, the effect of the law was to require the districts to pay thousands of dollars more for nurses than their own union had been willing to accept.

No doubt the New Jersey legislature appeared heroic to the school nurses. One can wonder, however, what would be the situation if the state of New Jersey had the responsibility for raising the taxes required to meet its mandate concerning the school nurses. Would the state of New Jersey in bargaining with its own employees, insist upon paying them substantially more than their own unions was willing to accept? I doubt it very much, but this is par for the course when one level of government can mandate costs which have to be paid from taxes raised at different levels of government.

A federal bargaining law could easily lead to the same unhappy result. This is true even though such a law is supposedly only procedural. No matter how the law is drafted, it will affect the bargaining power of the parties at the local level. For that matter, a federal law which authorized strikes by public employees would be more valuable to state and local public employee unions than legislation mandating favorable terms and conditions of employment on specific items, such as retirement or seniority. Whether or not federal legislation should affect the level of expenditures and other conditions of employment for public employees is a serious question. Whether or not a federal public employee bargaining law will have that effect, even though such legislation is "purely procedural", is not. Indeed, it would be hypocritical for public employee unions to contend that collective bargaining legislation is only procedural, in effect, merely because the law would specify that neither party is required to make a concession or agree to a proposal made by the other side.

One need only look at the literature of the public employee unions themselves to realize that they expect a host of substantive economic concessions to result from federal legislation. If they did not, it would be difficult to understand their strong interest in its enactment.

To phrase the issue differently, a federal bargaining law will inevitably result in a new balance of power between public management and public employee unions. If the balance is a poor one, state and local public management will have to clean up the mess as best they can. Meanwhile, members of Congress, like the New Jersey legislature in the example cited, may simultaneously be getting the "credit" from the beneficiaries of the legislation. With all due respect for the Congress, however, I believe that state leaders will have to take some initiative in the matter to forestall such an unhappy outcome.

An issue which is not as widely neglected today as it was two months ago is the potential impact of a federal law upon state legislation on job security, retirement, work day, sick leave, and dozens of other mandatory subjects of bargaining. Inasmuch as these issues have been explored in some detail in another document which is available to you, I shall not attempt to cover them here in any detail. The basic issues, however, are clearly fundamental from several standpoints. If the bill already introduced in the 94th Congress were enacted, a state legislature could no longer legislate retirement policy, or any policy dealing with a mandatory subject of bargaining. All such policies would be subject to the bargaining rather than the legislative process. There is certainly something to be said for a contractual instead of a legislative approach to terms and conditions of public employment, but the results will be catastrophic if the full implications of such legislation are not understood in time to reorganize state and local government before such legislation becomes effective.

A contractual approach to terms and conditions of public employment poses at least one other problem not present in the private sector. This problem emerges from the pressure and temptations to achieve agreements in the public sector by pension and retirement benefits whose costs to the taxpayers are substantial but deferred. The deferral is usually just far enough into the future for public management to avoid the political consequences of its largesse at the bargaining table.

At a common sense level, this issue clearly suggests a significant difference between public and private sector bargaining. In the private sector, management is under no special temptation or pressure to end-load agreements to the point where they endanger the effectiveness of future management. In the first place, although private sector management experiences turnover, such turnover is unquestionably less frequent than in the public sector, where management is subject to the political process. Secondly, private sector management frequently has a direct economic stake in the long range profitability of the enterprise being managed. The interest of public sector management in the economic health of the public enterprise is real but much more diffuse. The crucial point, however, is simply that private sector management receives immediate credit for settlements that strenghten future management, whereas public sector management frequently receives present credit (votes and political support) for settlements that mortgage the future to public employees. A mayor who is hoping to run for state or national office in the future may be highly tempted to reach agreement by concessions which are not fully felt or understood by the taxpayers until after the mayor has departed for higher office or other pursuits. By the time the taxpayers realize the full impact of the settlement,

the responsible political figures can be long gone, perhaps attaining higher political office precisely because they did not have to raise taxes during their term of office to pay for the expensive concessions they made at the bargaining table.

Clearly, some analysts believe this scenario actually describes the dynamics of public employee bargaining in recent years. The following data on retirement systems in New York City may help to explain this belief.

New York City Pension and Retirement Funds*

(Figures in millions of dollars)

	Total assets	Reserve for contributions	Reserve retired members	Assets remaining for active members	Liability for active members	Per cent of active liability funded
Emp. Ret. Sys.						
1967	$2,298	$757	$ 499	$1,042	$2,094	49.8
1970	2,738	777	1,032	929	3,912	23.7
1973	3,329	732	1,991	606	4,583	13.2
Teachers						
1967	1,788	495	740	553	1,380	40.1
1970	2,073	493	794	786	3,277	24.0
1973	2,326	469	1,484	373	4,178	8.9
Police						
1967	578	131	192	254	1,116	22.7
1970	796	130	348	318	1,540	20.6
1973	1,072	145	611	316	1,987	15.9
Fire*						
1967	239	45	77	117	582	20.2
1970	342	41	140	161	760	21.2
1973	453	39	209	204	1,048	19.5
Board of Ed.						
1967	92	32	26	34	77	43.7
1970	106	33	38	34	141	24.4
1973	117	32	62	23	152	15.0

*This fund only covers firemen hired on or after March, 1940. The ratio of retirees to active workers is expected to increase significantly as experience of the plan matures.

* Data prepared by New York State Permanent Commission on Public Employee Pension and Retirement Systems. Reprinted from New York Times, March 19, p. 41.

Regardless of the merits of the analysis as it applies to New York City, public management is much more likely than private sector management to adopt a "peace at any price" approach, as long as the price is paid on the installment plan. This difference is really one of kind rather than degree and should be considered in any legislation, state or federal, providing barain-ing rights for public employees. Of course, there is no precise weight to be accorded this consideration, but a realistic effort to achieve equity could

hardly ignore it as an important advantage which public sector employees currently enjoy vis-a-vis' private sector ones.

In considering the legislative possibilities, we should be cognizant of the situation that prevailed for a long time with respect to large scale federal aid to education. For years, a majority in both houses supported such aid. Nevertheless, such aid did not materialize because there were too many serious disagreements over the conditions under which it should be available. Southern members of Congress tended to support Federal aid to racially segregated schools but not to nonpublic schools. Northern members of Congress tended to support federal aid to nonpublic schools but not to racially segregated ones. And so for many years, there was a Congressional stalemate over the conditions of federal aid rather than a stalemate over the simple issue of whether there should be such aid at all. Quite possibly, there will be a similar stalemate over federal public employee collective bargaining legislation.

Whether or not this happens, there is an urgent need to de-rhetoricize the issues. For example, some proponents of such federal legislation keep repeating that it is useless to legislate against strikes because public employee strikes will occur anyway. This argument is as logical (or illogical) as one that we should not make homicide, rape, or theft a crime, because homicides, rapes, and thefts occur anyway. Without question, legislation is relevant to the number of strikes. Pennsylvania, which legalized public employee strikes, experienced 65 teacher strikes from 1971 to 1973, over one-fourth the total of 232 for the entire United States in that two year period. On the other hand, the majority of states in which public employee strikes were illegal experienced no such strikes, and the vast majority experienced three or fewer in those two years.

Likewise, most interest group references to state action are patently self serving. Those supporting federal legislation see "chaos" in the states; those opposing such legislation emphasize the virtues of diversity and the dangers of uniformity. Both groups are merely characterizing the data so as to support positions already staked out for other reasons.

Personally, I can envisage federal public employee collective bargaining legislation which would be acceptable to me. Whether it would be acceptable to anyone else is another matter. Similarly, others can envisage federal legislation which they can accept but which may not be able to generate enough support to become law.

If we continue to ignore the genuine dangers of a federal bill, and if we cannot find a way to meet the legitimate representational needs of public employees without sacrificing essential managerial ones, state and local government will be impaled between domination by the federal bureaucracy on the one hand, and by domination by public employee unions and bureaucracies on the other. This outcome can and should be avoided, but doing so - again, consistently with appropriate representational rights for public employees - will be difficult and politically hazardous. Whatever the outcome, it will inevitably play a major role in the future of our federal system.